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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-sixth session

SUMMARY RECORD OF THE 497th MEETING

Held at the Vienna International Centre, Vienna,
on Tuesday, 6 July 1993, at 2 p.m.

Chairman: Mr. MOHAMMED (Nigeria)

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The meeting was called to order at 2.10 p.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued) (A/CN.9/371, A/CN.9/375, A/CN.9/376 and Add.1 and 2, A/CN.9/377)

Consideration of draft Model Law on Procurement (continued)

Article 6 (continued)

1. The CHAIRMAN recalled that two issues in relation to article 6 had remained unresolved at the end of the previous meeting. He was happy to report that the proposal by the observer for the Inter-American Development Bank to delete the words "except where prequalification proceedings have taken place" in article 6 (7) had been withdrawn on the understanding that the idea behind it - namely, that a supplier or contractor should be able to correct information during prequalification proceedings but not later - would be inserted into article 7. Secondly, regarding materially incomplete or inaccurate information, the Australian delegation had agreed to go along with the view that incomplete information could be amended by the supplier or contractor since no tendering had taken place. On that understanding he took it that the Commission wished to adopt paragraphs (6) and (7) of article 6 subject to finalization of the drafting.

2. It was so decided.

Article 7

3. Mr. SAHAYDACHNY (Secretariat) said that the basic purpose of article 7 was to enable procuring entities to engage in prequalification proceedings. The Working Group had considered it important to include that aspect in the Guide to Enactment and in the Model Law mainly because certain procurement proceedings were costly and complex; the procuring entity might wish to examine the tenders only of suppliers or contractors it had established or qualified at the outset. The various paragraphs of article 7 established the principle that the prequalification procedures were essentially subject to the rules set forth in article 6 regarding in particular the criteria a procuring entity was permitted to employ in order to qualify a supplier or contractor. Another important principle was that the criteria used by the procuring entity must be disclosed to applicants for prequalification in the prequalification documents. Article 7 outlined the minimum required contents of prequalification documents, provided for a procedure for requests by applicants for clarification of those documents and contained a rule concerning the circulation of responses to such requests for clarification. It also established a procedure for what was sometimes called "post-qualification", which allowed the procuring entity to recheck and reconfirm the qualification of a supplier or contractor established at an earlier stage of the procurement proceedings, particularly if the initial qualification took place long before the time of the procurement contract and the procuring entity wished to make sure that the information originally submitted remained valid. Finally, he drew attention to the fact that article 7 (8) also referred to "false or inaccurate" information.

4. The CHAIRMAN invited discussion of paragraph (1) of article 7. Observing that there were no comments, he took it that the Commission wished to adopt that paragraph as it stood.

5. It was so decided.

6. The CHAIRMAN, observing that there were no comments on paragraph (2), took it that the Commission wished to adopt that paragraph as it stood.

7. It was so decided.

8. The CHAIRMAN invited discussion of paragraph (3).

9. Ms. ZIMMERMAN (Canada) said that paragraph (3) required the prequalification documents to include the information specified in the invitation to tender under article 19 (1), except subparagraphs (f), (g) and (i). In other words, subparagraph (j) of that article, which required the procuring entity to specify the place and deadline for the submission of tenders, would be incorporated into the paragraph under discussion. The procuring entity, however, might not always be in a position to state the place and deadline for the submission of tenders at the prequalification stage. She therefore suggested that article 19 (1), subparagraph (j), should also be excluded in article 7 (3) or, alternatively, that it should be made clear that the procuring entity's obligation in that regard existed only if the place and deadline for submission of tenders was known at the time. A similar proposal had been made by the Secretariat with respect to article 19 (2). Her delegation had adopted that concept and applied it to the paragraph under discussion.

10. The CHAIRMAN suggested that the matter should be considered during the discussion of article 19.

11. Mr. TUVAYANOND (Thailand) said he was not convinced that subparagraph (j) should also be excepted, since the place and deadline might be very important considerations.

12. Mr. SAHAYDACHNY (Secretariat) said that the issue had been discussed in the Working Group. The idea behind not requiring that information to be included in the invitation to prequalification or in the prequalification documents was that procurement proceedings involving prequalification might well stretch over a long period of time. The procuring entity might not be in a position, at the prequalification stage, to specify a place and deadline for the submission of tenders. As it might be unworkable to require such information in all cases, an alternative solution would be to emphasize the utility of that information and require it only if available or known. In the understanding of the Secretariat, the adoption of its proposal in regard to article 19 (2) would obviate the necessity for the proposed Canadian amendment to article 7 (3).

13. Mr. LEVY (Canada) said that it would be necessary to modify article 19 (1) (j) to refer to the invitation to prequalify as well as to the submission of tenders.

14. Mr. JAMES (United Kingdom) said that it would appear odd to repeat the exceptions both in article 7 and in article 19, and even more odd if the list of exceptions in each case differed, as that would imply an intended distinction. It was a matter that could be examined by the drafting group.

15. The CHAIRMAN said that the drafting group would add that point to its agenda. He took it that the Commission wished to adopt article 7 (3).

16. It was so decided.

17. The CHAIRMAN invited comments on paragraph (4) of article 7.

18. Ms. ZIMMERMAN (Canada) said that paragraph (4) dealt with a procuring entity's obligation to respond to requests for clarification in prequalification documents and that such clarifications provided by the procuring entity must be communicated to all suppliers and contractors provided with prequalification documents. It was, at least in Canada, not common practice to provide details of all clarifications to all parties in the prequalification process, though it was the practice to do so in the tendering process. In Canada a distinction was made since, at the prequalification stage, communicating such information to all contractors might be unnecessary and even costly. Canada therefore proposed that the word "shall" in the eighth line of the paragraph be amended to "may", so that the procuring entity would not be required to communicate such information in every instance.

19. Mr. WALLACE (United States of America) expressed his appreciation for the views put forward by the representative of Canada, but considered that the word "shall" should be retained. One purpose of the Model Law was to lay down the best possible practice. All potential bidders should be treated equally. The point was particularly relevant in regard to chapter V dealing with review: a party considering that it was unjustly refused qualification might challenge the procedure if that procedure was not public and the same for all bidders. To maintain high standards and to facilitate the challenge process, the word "shall" should be retained.

20. Mr. TUVAYANOND (Thailand) shared the concerns of Canada, but suggested a slightly different approach. The word "shall" should be retained, but the text should refer to "any reasonable request" or "for necessary clarification".

21. Mr. MORAN BOVIO (Spain) thought that the text was satisfactory as it stood. Though the Canadian proposal might, at first glance, seem useful, it did not appear to him a good idea to reduce the responsibilities of procuring entities. The Model Law was seeking to establish a minimum standard and it was not appropriate to lower that standard. The word "shall" should be retained. Nor was he in favour of the suggestions made by the representative of Thailand, since introducing a distinction between necessary and unnecessary clarifications might give discretionary powers to the procuring entity that could create problems within the procuring entity and between the procuring entity and contractors or suppliers. It would also be difficult to distinguish satisfactorily between necessary and unnecessary information. He supported the text as it stood since it provided an acceptable standard of requirements for procuring entities, which could bill for the costs involved in providing the information concerned.

22. Mr. TUVAYANOND (Thailand) said that the words "reasonable" or "necessary" were used in many conventions and model laws. It would be easy to establish whether a qualification was necessary or not. However, it was important to retain the word "shall", since suppliers or contractors should be entitled to clarification to facilitate their comprehension of the invitation to tender or prequalification documents.

23. Mr. JAMES (United Kingdom) expressed agreement with the representative of Spain. The words "reasonable" and "necessary" were well-known legal concepts often used in legislation; ultimately, however, they were matters of judgement and, in the United Kingdom, frequently gave rise to litigation when used in legislation. The Working Group had indeed considered whether some qualification of the obligation of the procuring entity to answer requests for information was needed, but had deemed it preferable to require answers to all requests for information since suppliers or contractors not given answers might exercise their rights under the review chapter, and thus delay the procurement process. Canada had accepted the principle elsewhere in the Model Law that, when the tendering process started, clarifications and additional information should be given to all parties. The same principle applied to the prequalification process and would not necessarily involve more expense. He would have to be convinced that there did indeed exist a difference in principle. He considered that the word "shall" should be retained for both the prequalification and the tendering processes.

24. Mr. LEVY (Canada) said that his delegation had raised the point at the behest of Canada's leading government procurement entity. Information and clarifications were far more crucial during tendering than during prequalification. Canada's proposal relied on the good faith of the procuring entities to make the clarifications available to those people to whom it would be of interest. However, acknowledging that there might be many requests for clarification which would only be relevant to those making the request, he suggested as a compromise that the words "if relevant" be inserted before the word "shall", which would make the document more practical and more widely acceptable and help to eliminate unnecessary procedures and costs.

25. Mr. PHUA (Singapore) supported the view expressed by several speakers that paragraph (4) should be retained as it stood. The crux of the matter was not whether the procuring entities could be trusted; the aim was to ensure that no one supplier was given any advantage over any other. To that end the procuring entity could not be allowed to choose whether or not to respond to certain requests for clarification or whether such clarifications should be communicated to all or any suppliers.

26. Mr. TUVAYANOND (Thailand) expressed concern about the cost of responding to "any request" if the provision remained mandatory. If a supplier or contractor requested lengthy information, such as a legal text, which then had to be passed on to every potential supplier, a great deal of expense would be involved.

27. The CHAIRMAN pointed out that the prequalification procedure was tied to article 6 and the information to be supplied under that article was not infinite.

28. Mr. PRIESTLEY (Observer for Australia) said that, if the word "reasonable" was inserted, the question would then be whether the expression "reasonable request" would be interpreted by a court of law as meaning anything other than a reasonable request. Seen from that point of view, Australia could support the clause as it stood on the basis that the difficulties envisaged by Canada would in all probability be met by a reasonable construction of "request" as meaning "reasonable request", should the question ever arise.

29. Mr. WALLACE (United States of America) said it should be remembered in that connection that the Model Law was not exclusive. The Model Law dealt only with what had been defined as public procurement, and it was understood that the normal laws of the land continued. However, for the sake of countries that might have problems, his delegation would have no objection to the addition of the word "reasonable", which was the least harmful of the suggestions.

30. The proposal to insert the word "relevant" was unacceptable, because as indicated by several delegations a different issue was involved: the first sentence concerned the burden on the procuring entity, while the second sentence concerned the fairness and impartiality of the process from the point of view of the bidder. If information was given to one bidder, it should be given to all. In the real world many "simple" inquiries would be made of procuring entities, the replies to which need not be passed on to all bidders. However, as a matter of written principle, the word "shall" should remain.

31. Mr. BONELL (Italy) said that the United States proposal seemed to be a very sound one and urged the Canadian delegation to agree to it.

32. Mr. GRUSSMAN (Austria) supported the United States proposal. The use of the word "reasonable" would mean that the request was relevant to all other suppliers. The question might usefully be considered from the point of view of the review proceedings: if a supplier asked for further information and the procuring entity did not consider the request reasonable, it would not respond and the matter could be submitted to a review procedure; however, if the word "relevant" was inserted, that could mean that other bidders would not be informed of the entity's interpretation and could not therefore seek review.

33. Mr. LEVY (Canada) said that, in view of the comments made and arguments put forward, his delegation would accept the United States proposal.

34. The United States proposal was adopted.

35. Paragraph (4), as amended, was approved.

36. Ms. ZIMMERMAN (Canada), referring to paragraph (5), said that in the second sentence it would be more appropriate to provide that in reaching the decision in question the procuring entity should use only those criteria set forth in the prequalification documents. However, that was a drafting point.

37. The CHAIRMAN said that the matter would be taken care of by the drafting group.

(The Chairman)

38. Paragraph (5) was adopted on that understanding.

39. Paragraphs (6) and (7) were adopted.

40. Ms. ZIMMERMAN (Canada), referring to paragraph (8), said that the reference to prequalification in the context of the second sentence appeared unnecessary, as the point was already covered by article 6 (6).

41. With regard to the reference to false or inaccurate information, her delegation's comment was similar to that made in connection with article 6 - namely, that reference should also be made to incomplete information.

42. The CHAIRMAN said that the Secretariat had noted the point about "incomplete information"; the text should be brought in line with the amendment already adopted to article 6.

43. Mr. TUVAYANOND (Thailand) wondered why the first part of the second sentence used the word "shall". Why could not disqualification be left to the discretion of the procuring entity?

44. Mr. SAHAYDACHNY (Secretariat) said that the Working Group had felt that the provision had to be mandatory. If a supplier or contractor who had previously qualified suddenly failed to qualify because of a change in his circumstances and the information earlier provided was no longer valid, the procuring entity had no choice but to disqualify him because article 6 stated that qualification had to be based on the criteria referred to in that article and disclosed in the solicitation documents.

45. The word "may" had been used in the second part of the sentence to be consistent with article 6 (6), which left it to the discretion of the procuring entity whether or not the submission of false or inaccurate information should result in disqualification.

46. Mr. TUVAYANOND (Thailand) said that he had difficulty in understanding the reference to "reconfirmation".

47. Mr. SAHAYDACHNY (Secretariat) said that, if at an early stage of the procurement proceeding, a given supplier was deemed to have met the qualification criteria disclosed in the solicitation documents, and later on he became the successful supplier, the procuring entity, before entering into a procurement contract with him, might wish to verify that the qualification evaluation made earlier remained valid and might therefore ask him to confirm, but update, the information supplied earlier. The text provided that, if on that second scrutiny, based on the same criteria, the supplier no longer qualified, then disqualification was mandatory.

48. Mr. GRUSSMAN (Austria) said that the first sentence of paragraph (8) seemed to make the basic point clear; perhaps the second sentence could be deleted.

49. Mr. WALLACE (United States of America), referring to the Canadian delegation's comments, said that the reference to prequalification should be retained if the sentence itself were retained; however, the words "at any time" in article 6 (6) should perhaps be deleted.

50. With regard to "reconfirmation", the text was perhaps ambiguous, because failure to reconfirm did not necessarily mean that the supplier was not qualified. He suggested that the sentence should be reworded on the following lines: "The procuring entity shall disqualify any supplier or contractor which the reconfirmation process shows to be unqualified".

51. The CHAIRMAN suggested that, as the problem was not a substantive one, the text should be referred to the drafting group.

52. Paragraph (8) was adopted on that understanding.

Article 8

53. Mr. LEVY (Canada), referring to his Government's comments in document A/CN.9/376/Add.1, said his delegation recognized that, in some situations, a reciprocity requirement was unnecessary and uncalled for. For example, there was no reference to reciprocity in connection with the recognition of foreign arbitral awards in the UNCITRAL Model Law on International Commercial Arbitration, which had been enacted on the premise that it was good for foreign arbitral awards to be recognized in order to facilitate dispute settlement. However, in the present case, it might be asked why a State would enter into an agreement such as the General Agreement on Tariffs and Trade (GATT) or the proposed North American Free Trade Agreement while at the same time giving generally free and open access to procurements to all foreign nationals. Although a reciprocity provision could be contained in regulations, it would be more transparent if article 8 were to be amended and based on reciprocity. His delegation suggested the following wording for the beginning of paragraph (1): "Suppliers and contractors from States that have adopted legislation consistent with the Model Law and, in particular, this article are permitted to participate in procurement proceedings without regard to nationality ..." The aim was to align the Model Law in some respects with the concepts embodied in trade agreements that had been entered into by States.

54. Mr. JAMES (United Kingdom) said that article 8 was an extremely important article and that it had been considered in some depth in the Working Group. The Working Group had concluded that the principles contained in it were the correct ones. The principle of no discrimination based on nationality should be the basic principle for a model law drafted by the United Nations. There were exceptions because it was recognized that there would be circumstances in which enacting States might have in their existing law, or might wish to enact at the same time as the procurement law, provisions to enable the procuring entity to limit participation in certain cases, which should be clearly defined and based on the law of the enacting State.

55. The suggestion made by the representative of Canada would have the effect of destroying the underlying purpose of article 8, namely that suppliers and contractors from any State should normally have the right to participate in procurement. What the Canadian delegation was proposing was very dangerous;

(Mr. James, United Kingdom)

it would represent a step towards protectionism, which would be quite unacceptable to his delegation. He was sure that most delegations wanted to see more free trade and competition, with equality of opportunity for suppliers from developing and developed States. The idea that competition in procurement should be restricted to those who had subscribed to the procurement code was unacceptable and contrary to the purpose of the Model Law which was to encourage free trade. The words of the preamble were very important, particularly paragraph (b). If the Canadian proposal was accepted, one might as well abandon the Model Law.

56. Mr. WALLACE (United States of America) said that his delegation supported the views expressed by the delegation of the United Kingdom. His delegation found it inexplicable that the Canadian delegation could raise such a point at that juncture. The matter had already been raised on many occasions and his delegation had been pleasantly surprised that agreement had been reached on such an open wording in the draft law. The preamble had already been passed, without objection from the Canadian delegation. What was being discussed was not trade policy, but a model law, embodying provision for treaty exception. The commentary on article 8 specifically mentioned treaty arrangements. As a matter of trade policy, the Canadian proposal was profoundly unwise and quite inconsistent with the current policy of Canada and other Governments participating in GATT. If the proposed change were adopted, he would recommend to his Government that it should not agree to the Model Law.

57. Mr. TUVAYANOND (Thailand) wondered why the term "suppliers and contractors" had been used in paragraph (1), rather than "suppliers or contractors", as had been used elsewhere.

58. Secondly, his delegation wondered what Governments were supposed to do in cases of economic sanctions. Would such a case constitute an exception to the rule of non-discrimination or would the suppliers from the target country be eligible to participate in the procurement process?

59. The CHAIRMAN drew attention to the commentary (see document A/CN.9/375) and said that, in the case of a Security Council resolution, the ruling would be binding on all States and contractors from embargoed States should not participate.

60. Mr. TUVAYANOND (Thailand) asked whether it was possible for a country to exclude any applicant for security reasons or for strong political policy reasons.

61. The CHAIRMAN noted that the text allowed an enacting State to insert an exclusion in its own regulations.

62. Mr. GRIFFITH (Observer for Australia) said that it was very much the view of the Australian delegation that the principle set out in paragraph (b) of the preamble should be vindicated as far as possible in finalizing the text. It was, however, necessary to admit the possibility of exceptions, as provided for in paragraph (1) of article 8. The reality was that the Model Law would be adopted only if it admitted the possibility of exceptions to the nationality provision. His delegation thus accepted the Working Group's text,

(Mr. Griffith, Observer for Australia)

but hoped that the Commission would do what it could to support the principle stated in paragraph (b) of the preamble. The commentary, in its final form, could make the general point, with reference to the Preamble in general, paragraph (b) thereof or article 8, that the strong view of the Commission was that, in so far as possible, there should be no discrimination based on nationality. There should also be a statement that the basic view of the Commission was that there should be no discrimination between non-nationals. An enacting State might have a preference for nationals over non-nationals, but there should be no discrimination between non-nationals.

63. As the draft Guide to Enactment (A/CN.9/375) made clear, obligations such as those imposed by the Security Council were allowed for by the text.

64. The CHAIRMAN, with reference to non-discrimination between non-nationals, drew attention to the provisions of paragraph (5) of article 6.

65. Mr. RAO (India) said the provision in article 8 would be undesirable in certain situations, for political reasons. It should be for the procuring entity to determine who should participate, in the light of the principle of reciprocity. Developing countries like India exercised marginal preferences for certain categories of supplier, such as small producers and development corporations. In India, price advantages were given to small producers, and procuring entities gave preference to the public sector, and to home-produced goods bearing an Indian standard. He therefore agreed with the representative of Canada that participation in procurement proceedings under article 8 should be based on reciprocity, giving preference to suppliers, contractors or bidders which had adopted the Model Law.

66. Mr. HAINZL (Austria) said the intention of the Model Law was to avoid discrimination based on nationality. Article 8 was counter-productive, opening the door to all kinds of discrimination. His delegation supported the view that there should be no discrimination on grounds of nationality. If there were any, it should be based on reciprocity, so that all States and legislatures which accepted the Model Law would have to accept bidders from any other country that did the same.

67. Mr. BONELL (Italy) said that the Canadian proposal should be considered on its merits. He did not support it, because the Model Law was not intended to serve the purpose of a law on competition, or an anti-trust law. The ultimate goals stated in the preamble were a form of wishful thinking, and must not be confused with the operative rules, which must be carefully and unambiguously drafted. Article 8 raised controversial economic and political issues. If the Commission's intention was to open the door as far as possible to international competition, article 8 must say so clearly. As presently drafted it was unclear. Its wording would enable States to discriminate on a case-by-case basis, on grounds which would be lawful but need not be stated in advance. Article 17 dealt with the preference, mentioned by the representative of India, for domestic procurement in the case of small entities or contracts. The case contemplated in article 17 (b) should be the main reason for applying the exemption provided for in paragraph (1) of article 8. Both articles must be framed in unambiguous language.

68. Mr. SOLIMAN (Egypt) supported the proposal of the representative of Canada that participation in procurement proceedings should be confined to suppliers from States which had adopted the Model Law. Indeed, a provision along those lines would help to encourage adherence to the Model Law.

69. Mr. MORAN BOVIO (Spain) preferred to retain the existing wording of article 8. Doubts had been expressed about paragraph (1), but they could be dispelled by the commentary on article 8 in the draft Guide to Enactment (A/CN.9/375). Paragraph 1 of the commentary on article 8 explained the reason for the exceptions provided; he drew particular attention in that connection to the last three sentences. There was broad agreement within the Commission on the general principle laid down in article 8 (i), but it could not be implemented immediately because of the international obligations mentioned in the commentary. Those were public commitments, and could not be described as unfair to other States.

70. Mr. WALLACE (United States of America) said the representative of Spain had offered a useful reminder of the historical background to the drafting of article 8. That article represented a compromise achieved over a period of years during which the legal presumption had shifted in favour of international competition. Article 17 likewise represented a compromise, and it was already clear, in article 8, that a State was entirely free under its own law to confine procurement to domestic suppliers. In recent years, the law had moved towards openness and non-discrimination; yet it remained clear, in article 17, that Governments had the right to exclude foreign competition. Where the Model Law was found to be too compact or opaque, guidance should be sought in the commentary, which he felt could be much more explicit. In his own earlier remark referred to by the representative of Italy, what he had meant was that he would recommend that his Government should not agree to the Model Law if the proposal was adopted.

71. The CHAIRMAN said that the discussion turned upon a proposal by the representative of Canada to insert a reciprocity clause into paragraph (1) of article 8. In its present wording, paragraph (1) was felt to be unclear, but as had been pointed out the reason for the exception provided for was stated in the draft Guide to Enactment. If necessary, the Commission could perhaps amend the commentary in the draft Guide.

72. Mr. BONELL (Italy) pointed out that the draft Guide to Enactment emphasized that the exceptions were not to be made "informally or secretly". Article 8 did not attempt to say which suppliers and contractors would be awarded a contract, but rather to state the grounds on which they would be "permitted to participate". Such participation could hardly be secret, nor could a foreign supplier be debarred in secret. Article 8 should emphasize the exceptional character of any exclusions granted on grounds of nationality. In most cases, exclusion would be due to the low value of the procurement, or to international regulations, and such exceptions should be clearly defined. The reference in the draft Guide to secrecy and informality should be deleted, since article 8 was dealing only with admission to procurement procedures. The commentary could perhaps be expanded to reflect the majority view of the Commission, in which case he would support retention of article 8 in its present wording.

73. Mr. HUNJA (Secretariat) said that the Commission appeared to be of the same mind as the Working Group, preferring to leave the text of article 8 as it now was. He noted the misgivings expressed by the representative of India about non-discrimination towards foreign suppliers. In the Working Group, it had been emphasized that States had the right to make any exemptions they wished under the procurement regulations. It was also explained in paragraph 1 of the commentary on article 8 that obligations of enacting States such as those based on regional economic groupings were allowed for. That might also extend to reciprocal arrangements. The commentary should perhaps highlight the point that possible exemptions were not confined to those specifically mentioned in article 8.

74. The CHAIRMAN said he thought that most delegations could live with that approach. He suggested that the Commission should agree that the difficulties mentioned should be taken care of in the commentary.

75. It was so decided.

The meeting rose at 5 p.m.